SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 76

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE UNDER THE WILL OF WILLIAM L. DuBOIS, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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1 Before United States Board of Tax Appeals

Docket No. 48492

FIDELITY-PHILADELPHIA TRUST CO., TRUSTEE UNDER THE WILL OF William L. Dubois, Deceased, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For taxpayer—John B. Peery, C.P.A., Robert T. McCracken, Esq.; for Comm'r: M. M. Mahaney, Esq.

Docket entries

Apr. 26, 1930. Petition received and filed. Taxpayer notified. (Fee paid.)
Apr. 28, 1930. Copy of petition served on General Counsel.
May [illegible], 1930. Answer filed by General Counsel.
May 28, 1930. Copy of answer served on taxpayer. General Calendar.
Jan. 23, 1932. Motion to consolidate with dockets 43883 and 51669, filed by taxpayer. January 25, 1932, granted.
Jan. 23, 1932. Notice of appearance of John B. Peery as counsel, filed.
Jan. 28, 1932. Hearing had before Mr. Trammell, div. 2 on merits. Stipulation of facts filed. Briefs due in 60 days.
2 Feb. 3, 1932. Transcript of hearing January 28, 1932, filed.
Mar. 25, 1932. Brief filed by taxpayer.
May 25, 1932. Brief filed by General Counsel.
Apr. 30, 1932. Findings of fact and opinion rendered, Mr. Trammell, div. 2. Judgment will be entered under rule 50.
May 26, 1932. Notice of settlement filed by General Counsel.
June 3, 1932. Decision entered, Mr. Trammell, div. 2.
June 13, 1932. Supersedeas bond for $3,526.82 approved and ordered filed.
June 13, 1932. Petition for review by U.S. Circuit Court of Appeals (3) with assignments of error filed by taxpayer. Proof of service thereon.
June 13, 1932. Præcipe filed by taxpayer. Proof of service thereon.

Before United States Board of Tax Appeals

Docket No. 51069

FIDELITY-PHILADELPHIA TRUST CO., TRUSTEE UNDER THE WILL OF William L. DuBois, Deceased, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For taxpayer—John B. Peery, C.P.A., Robert T. McCracken, Esq.; for Comm'r: M. M. Mahaney, Esq.

Docket entries

Dec. 30, 1930. Petition received and filed. Taxpayer notified. (Fee paid.)
Dec. 30, 1930. Copy of petition served on General Counsel.
Feb. 12, 1931. Answer filed by General Counsel.
Feb. 18, 1931. Copy served. General Calendar.
Jan. 23, 1932. Motion to consolidate with dockets 43883 and 48492, filed by taxpayer. January 25, 1932, granted.
Jan. 28, 1932. Hearing had before C. M. Trammell, div. 2 on merits. Submitted. Stipulation of facts filed. Briefs due in 60 days.
Feb. 3, 1932. Transcript of hearing of Jan. 28, 1932, filed.
Mar. 25, 1932. Brief filed by General Counsel.
4 Mar. 25, 1932. Brief filed by taxpayer.
Apr. 30, 1932. Findings of fact and opinion rendered, Mr. Trammell, div. 2. Judgment will be entered for the respondent.
May 4, 1932. Decision entered, C. M. Trammell, div. 2.
June 13, 1932. Supersedeas bond for $3,526,82 approved and ordered filed.
June 13, 1932. Petition for review by U.S. Circuit Court of Appeals (3) with assignments of error filed by taxpayer. Proof of service thereon.
June 13, 1932. Præcipe filed by taxpayer. Proof of service thereon.

5 Before United States Board of Tax Appeals

Docket No. 48492

[Title omitted.]

Petition

Filed April 26, 1930

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Reve-

nue in his notice of deficiency (IT:AR:B-7-JWJ-60D) dated February 28, 1930, and as a basis of this proceeding alleges as follows:

First. The petitioner is a corporation, organized and existing under the laws of the Commonwealth of Pennsylvania, and as such is trustee under the will of William L. DuBois, deceased, with principal office at 135 South Broad Street, Philadelphia, Pennsylvania.

Second. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on February 28, 1930.

6 Third. The tax in controversy is income tax for the calendar year 1926 in the amount of $905.76, all of which is denied.

Fourth: The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) In holding that the distributions of the income received and distributed by the petitioner, during the taxable year 1926, to the widow of William L. DuBois, deceased, under the will of said deceased person, constitute capital expenditures, and that said distributions constitute taxable income to the trustee.

(b) In computing a normal tax upon the sum of $3,746.42 representing dividends on stocks of domestic corporations.

(c) In assessing a tax on one third of the income payable to organized charitable institutions.

Fifth. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) William L. DuBois died on October 26, 1918, leaving an estate valued at approximately six hundred and seventy-nine thousand dollars ($679,000), the income from which estate was, by the terms of the decedent's will, distributable to his widow, Mrs. Mary C. DuBois, for life, after the payment of an annuity of $4,000.

(b) During the year 1926 the petitioner, as trustee under the will of William L. DuBois, deceased, distributed the income received from the estate of said deceased person to Mrs. Mary C. DuBois and so reported this fact to the Commissioner of Internal Revenue.

7 (c) Section 219 (a) 2, Revenue Act of 1926.

Regulations 69, article 342, promulgated by the Commissioner of Internal Revenue under Revenue Act of 1926.

(d) That the Revenue Act of 1926 provides that dividends of stocks of domestic corporations are not subject to normal tax.

(e) The will of William L. DuBois provides that after the death of his widow, Mrs. Mary C. DuBois, one third of the income from his residuary estate was to be paid to his granddaughter, Mary C. DuBois, for life and upon her death, one third of the principal is to pass to her issue, and in default of issue, to the following charitable institutions:

The contributors to the Pennsylvania Hospital, 55 percent of one third of the residuary estate;

The Presbyterian Orphanage of the State of Pennsylvania, 15 percent of one third of the residuary estate;

The Presbyterian Hospital in Philadelphia, 15 percent of one third of the residuary estate;

The Board of Foreign Missions of the Presbyterian Church in the United States, 15 percent of one third of the residuary estate.

(f) That the testator's granddaughter, Mary C. BuBois, predeceased her grandmother, Mary C. BuBois, leaving no issue, so that one third of this estate passes absolutely to charity on the death of the life tenant and is exempt from income tax.

Wherefore the petitioner prays that this Board may hear and determine its appeal and that relief may be granted from the
8 deficiency asserted by the Commissioner of Internal Revenue.

FIDELITY-PHILADELPHIA TRUST COMPANY,
Trustee, Under the Will of William L. DuBois, Deceased,
By N. C. DENNEY, *Vice President.*

[*Duly sworn to by N. C. Denney; jurat omitted in printing.*]

9 *Exhibit A to petition*

N-p 2.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, February 28, 1930.

Trust u/w WILLIAM L. DUBOIS,
Fidelity-Philadelphia Trust Company,
415 Chestnut Street, Philadelphia, Pennsylvania.

SIRS: In accordance with section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the year 1926 discloses a deficiency of $905.76 as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the inclosed form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D.C., for the attention of IT:C:P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days

after filing the agreement form, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,

ROBT. H. LUCAS,
Commissioner,
By (signed) DAVID BURNET,
Deputy Commissioner.

Inclosures:
Statement.
Form 866.
Form 882.

IT:AR:B-7
JWJ-60D

FEBRUARY 28, 1930.

STATEMENT

In re: Trust u/w WILLIAM L. DUBOIS,
Fidelity-Philadelphia Trust Company,
415 Chestnut Street, Philadelphia, Pennsylvania.

Year	Corrected tax liability	Tax previously assessed	Deficiency
1926	$905.76	None	$905.76

The audit of the income tax liability of the trust discloses the following adjustments:

	1926
Net income shown by return	None
Add:	
1. Income from tax-free covenant bonds	$16,503.76
2. Other income	2,757.38
3. Dividends	3,746.42
Total net income subject to surtax	$23.007.56
Less: Exemption	1,500.00
Balance subject to normal tax	$21,507.56
Normal tax at 1½% on $4,000.00	$60.00
Normal tax at 3% on $4,000.00	120.00
Normal tax at 5% on $13,507.56	675.38
Surtax on $23,077.56	380.45
Total tax	$1,235.83
Less: Tax paid at source	330.07
Tax deficiency	$905.76

Explanation of changes

1, 2, and 3. The income distributed to Mrs. Mary C. DuBois in lieu of dower right is taxable to the estate. (See I.T. 2480, Bulletin 29, volume 8, page 4.)

Payment should not be made until a bill is received from the collector of internal revenue for your district and remittance should then be made to him.

Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1926, the Bureau will be unable to afford you an opportunity under the provisions of Treasury Decision 3867 to discuss your case before mailing formal notice of its determination as provided by section 274 (a) of the Revenue Act of 1926. It is, therefore, necessary at this time, in order to protect the interest of the Government, to issue this formal notice o fdeficiency.

12 Before U.S. Board of Tax Appeals

Docket No. 48492

Answer

Filed May 26, 1930

The Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition herein, admits and denies as follows:

First. Admits the allegations of the first paragraph of the petition.

Second. Admits the allegations of the second paragraph of the petition.

Third. Admits the tax in controversy is income tax for the calendar year 1926, and denies that the amount in controversy is $905.76.

Fourth. Denies that the Commissioner erred as alleged in the fourth paragraph of the petition.

Fifth. For lack of knowledge denies the allegations contained in the fifth paragraph of the petition.

Denies each and every allegation of fact contained in said petition not hereinbefore specifically admitted, qualified, or denied.

Wherefore, it is prayed that the determination of the Commissioner be affirmed.

(Sgd.) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:
BROOKS FULLERTON,
Special Attorney, Bureau of Internal Revenue.

13 Before United States Board of Tax Appeals

Docket No. 51,669

[Title omitted.]

Petition

Filed December 30, 1930

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his deficiency letter (IT:AR:B-1-AMK-60D) bearing date of December 11, 1930, a copy of which letter is attached hereto and made a part hereof, and as a basis for this proceeding alleges as follows:

First. The petitioner is a body corporate organized under the laws of the State of Pennsylvania and as such is the duly appointed and qualified trustee under the will of William L. DuBois, deceased.

Second. The deficiency letter of the Commissioner of Internal Revenue bears date of December 11, 1930, though the actual date of mailing same is unknown to the petitioner.

14 Third. The tax in controversy is income tax in the sum of $1,044.97 for the taxable year 1927.

Fourth. The determination of the deficiency set forth in the Commissioner's deficiency letter above referred to is based upon the following errors:

(a) In holding that income received during the taxable year 1927 and distributed to the widow of William L. DuBois, deceased, under the terms of the will of said deceased person, constitute capital expenditures, and that said distributed income is taxable to the trustee for income tax purposes.

(b) Should the Board hold that the income of the trust established by the will of William L. DuBois, deceased, is properly taxable to the trustee, then the Commissioner of Internal Revenue has erred in that no allowance as a deduction from gross income has been made for income accumulated for the benefit of certain charitable institutions named in the will of William L. DuBois, deceased.

Fifth. In support of its petition the petitioner relies upon the following facts:

(a) William L. DuBois died on October 26, 1918, leaving an estate valued for purposes of Federal estate tax at approximately six hundred and seventy-nine thousand dollars ($679,000) the income from which estate was, by the terms of the decedent's will, distributable to his widow, Mrs. Mary C. DuBois, for life, after the payment of an annuity of four thousand dollars ($4,000) per annum.

(b) During the year 1927 the petitioner, as trustee under
15 the will of William L. DuBois, deceased, distributed to Mrs. Mary C. DuBois $24,731.88 prior to her death on November 22, 1927, and distributed to the executor of Mary C. DuBois, de-

ceased, the balance of the income accrued and unpaid at the date of her death.

(c) The distributions made to Mrs. Mary C. DuBois during the year 1927 added to distributions made to her in prior years did not total an amount equal to the value of her statutory rights in the estate of William L. DuBois, deceased.

(d) The will of William L. DuBois, deceased, contained a provision for the payment to his granddaughter, Mary C. DuBois, the income from one third of the residue of his estate, after she attained her majority and after the death of his wife, Mrs. Mary C. DuBois. The will of William L. DuBois, deceased, provided further that should his granddaughter, Mary C. DuBois, die without issue this one third of his residuary estate went to certain charitable institutions named in the will.

(d) Mary C. DuBois, granddaughter of William L. DuBois, deceased, died on August 26, 1924, which date is prior to the date of the death of Mrs. Mary C. DuBois, widow of William L. DuBois, deceased, and at the time of her death was without issue.

Wherefore the petitioner prays that this Board may hear and determine its appeal and that relief may be granted from the deficiency asserted by the Commissioner of Internal Revenue.

JOHN B. PEERY.
JOHN B. PEERY, C.P.A.,
510 First Natl. Bank Bldg., Baltimore, Maryland,
Counsel for the Petitioner.

[*Duly sworn to by N. C. Denney; jurat omitted in printing.*]

17 *EXHIBIT TO PETITION*

(Copy)

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Dec. 11, 1930.

FIDELITY-PHILADELPHIA TRUST COMPANY, *Trustee,*
u/w William L. DuBois, Philadelphia, Pennsylvania.

SIRS: You are advised that the determination of your tax liability for the year (s) 1927 discloses a deficiency of $1,044.97, as shown in the statement attached.

In accordance with section 274 of the Revenue Act of 1926, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D.C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing

of your return(s) by permitting an earlier assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is
18 earlier; Whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.

By (signed) W. T. SHERWOOD,
Deputy Commissioner.

Enclosures:
Statement.
Form 882.
Form 870.

IT:AR:B-1
AMK-60D

STATEMENT

In re: FIDELITY-PHILADELPHIA TRUST COMPANY, *Trustee,*
u/w William L. DuBois, Philadelphia, Pennsylvania.

Year	Corrected tax liability	Tax previously assessed	Deficiency
1927	$1,049.95	$4.98	$1,044.97

Reference is made to your letter dated December 3, 1930, in reply to office letter of November 29, 1930, relative to the tax liability of the trust u/w of William L. DuBois for the year 1927.

Careful consideration has been accorded the information furnished in your letter relative to income distributed to Mary C. DuBois, deceased, after her death, but accrued prior thereto.

It is held, however, that the income in question, consisting of $380.57 dividends and $1,859.68 as other income, is taxable to this trust inasmuch as the income had accrued prior to the death
19 of Mary C. DuBois and since up to that time the decedent had not received from the estate of William L. DuBois her statutory interest therein. See income tax ruling 2480, Cumulative Bulletin VIII-2, page 141.

Net income reported on return		$1,832.31
Add:		
1. Dividends		4,394.97
2. Other income		19,373.10
Net income adjusted		$26,200.38
Less:		
Dividends	$4,394.97	
Personal exemption	1,500.00	
		5,894.97
Income subject to normal tax		$20,305.41

Normal tax at 1½% on $4,000.00	$60.00
Normal tax at 3% on $4,000.00	120.00
Normal tax at 5% on $12,305.41	615.27
Surtax on $26,200.38	594.08
Total tax	$1,389.30
Less: Tax paid at source	339.35
Net tax liability	$1,049.95
Tax previously assessed	4.98
Deficiency in tax	$1,044.97

Payment should not be made until a bill is received from the collector of internal revenue for your district, and remittance should then be made to him.

20 Before U.S. Board of Tax Appeals

Docket No. 51669

Answer

Filed February 12, 1931

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

First. Admits the allegations contained in paragraph first of the petition.

Second. Admits the allegations contained in paragraph second of the petition.

Third. Admits the allegations contained in paragraph third of the petition.

Fifth. For lack of sufficient information upon which to form a belief, denies the allegations contained in paragraph fifth (a), (b), (d), and (e); admits the allegations contained in paragraph fifth (c) of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the appeal be denied.

(Sgd.) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:

MAXWELL M. MAHANY,
Special Attorney, Bureau of Internal Revenue.

21 Before United States Board of Tax Appeals

Docket Nos. 43883, 48492, 51669

[Title omitted.]

Motion to consolidate cases

Filed January 23, 1932

Comes now the petitioner by its representative, John B. Peery, C.P.A., and moves that the three above-pending appeals be consolidated for hearing on January 28, 1932, for the following reasons:

First. The case of docket no. 43883 is now set for a hearing before the Board on January 28, 1932, and the petitioner expects to produce testimony before the Board as to the running of the statute of limitations, as alleged in its "motion to amend petition" previously filed with the Board.

Second. As to all other allegations of error in the three cases it is expected that an "agreed statement of facts" will be submitted to the Board by the respondent and the petitioner, as a basis
22 for the Board's decision, the errors alleged by the petitioner as to the major issues in all of these cases being identical.

(Sgd.) JOHN B. PEERY, C.P.A.,
510 First National Bank Building, Baltimore, Maryland,
For the Petitioner.

Granted January 25, 1932.

(Sgd.) LOGAN MORRIS,
Member, United States Board of Tax Appeals.

Before United States Board of Tax Appeals

Agreed statement of facts

Filed January 28, 1932

The petitioner, Fidelity-Philadelphia Trust Company, a body corporate under the laws of the State of Pennsylvania and successor to the Philadelphia Trust Company, is the duly qualified and acting trustee under the will of William L. DuBois, deceased, who died October 26, 1918, while a resident of Pennsylvania. The will, dated December 14, 1915, with codicils dated February 23, 1916, June 26, 1917, September 20, 1917, and December 7, 1917, and duly admitted to probate in Philadelphia County, Pennsylvania, provided, so far as is pertinent to the issues herein involved, as follows:

"VI. All the rest, residue, and remainder of my estate, real, personal, and mixed, . . . I give, devise, and bequeath to my son,

Henry C. DuBois, and the Philadelphia Trust Company, in trust for the following uses, intents, and purposes, that is to say, to
23 hold and invest the said trust estate either in the securities and other assets that I may leave or in such others as my trustees in their discretion may acquire, with the power to acquire real estate, and to alter, sell, change, and shift the investments, . . . releasing them from all liability to loss by reason of the exercise of this discretion; to collect the income and to pay first the sum of four thousand (4,000) dollars per annum to my son Henry C. DuBois, . . . until the death of his mother, and the balance to my wife, Mary C. DuBois, for and during all the term of her natural life, and upon her decease, . . . to continue the said trust estate for the following purposes, viz: . . . to pay two thirds of the income to my son Henry C. DuBois . . . for and during all the term of his natural life, and upon his decease to transfer, convey, and assign the portion of the trust estate thus directed to be held for him to such person or persons . . . or charities, and for such estate or estates as he, . . . shall by his last will and testament direct, limit, and appoint, . . . and in default of his exercise of his power of appointment, to transfer, convey, and asign the said portion to the children and issue of deceased children of my son Henry by representation . . . and in default of appointment and issue, then to the following charities in the proportions herein named: . . .

Pennsylvania Hospital	55%
The Presbyterian Orphanage	15%
The Presbyterian Hospital	15%
The Board of Foreign Missions of the Presbyterian Church	15%

"As to the remaining one third of the income, I direct that it be accumulated during the minority of my granddaughter, Mary C. DuBois, the said accumulations not to be for her benefit except as to the allowance hereinafter provided, but to be paid from the time of my decease up to the time of her majority, or death if it occur earlier, with all accretions and increase, to the Pennsylvania
24 Hospital as a gift to it; and from and after her majority, the said income shall be paid to her for and during the term of her natural life . . . and from and immediately after her decease then to transfer the principal upon which she had thus been appointed to receive the income, and which was held for her benefit, being the one-third part remaining of my residuary estate, to the children and remoter issue of my said granddaughter by representation, and in default of issues, then to the same charities and in the same proportions as already named in connection with my said son Henry's share; provided that a sum not exceeding three thousand (3,000) dollars per annum out of the income may be expended or accumulated for her benefit during her minority, should that amount be required for the purpose, and I appoint Henry C. DuBois and the Philadelphia Trust Company to be her guardians to arrange

RESPONDENT'S EXHIBIT "A."

ACCEPTED — FOURTH QUARTER

Form 1041
U. S. Treasury Department

FIDUCIARY RETURN OF INCOME
For Calendar Year 1926

No. 109

No. 951938

RECEIVED
MAR 11 1927

11-15-27
Exmp
Ltr A.R.-18

For fiscal year beginning ____, 1926, and ended ____, 1927

File this form for each year on the 15th day of the third month following the close of the taxable year (Sec. 3 Fiduciary Act, approved February 24, 1919).

Name of estate or trust: [illegible] WILLIAM L. [illegible], DECEASED

Name and address of fiduciary: GIRARD TRUST COMPANY, PHILADELPHIA, PENN'A, Trustee

416 CHESTNUT STREET, PHILADELPHIA, PA.

1. Was a return of income for 1926 filed on behalf of the estate or trust named above? Yes
If so, to what collector's office was it sent (give district or city and State)? Philadelphia, Penna.
Give date of creation of trust or decedent's death: January 20, 1919

INCOME

2. Net profit from Trade or Business (Form 1040-C)	575 46	
3. Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds	10,719 85	
4. Income from Partnerships, Fiduciaries, etc.		
		10,719 85
5. Rents and Royalties		
6. Profit from Sale of Real Estate, Stocks, Bonds, etc.		
7. Dividends on Stock of Domestic Corporations	43 46	
8. Other Income (including dividends received on stock of foreign corporations)		
(a)		
(b)		
(c)		29,367 69
Total Income as shown in lines 1 to 8		
9. Interest Paid	1,125 44	
10. Taxes Paid		
11. Losses by Fire, Storm, etc.		
12. Bad Debts		
13. Contributions		
14. Other Deductions Authorized by Law (Explain in detail) SHARES FOR EXPENSES OF TRUSTEE	1,552 53	
15. Total Deductions as shown in lines 9 to 14		2,677 97
16. Net Income (line 8 minus line 15)		26,689 72

17. BENEFICIARIES' SHARES OF INCOME AND CREDITS

Name and address of each beneficiary	Class of beneficiary	Proportion of net income	Amount of net income	Amount of tax	Amount of credit for tax paid at source	Amount of tax to be paid by beneficiary
(a) Harry C. Dalton, c/o E. J. Lonsdale, Bullitt Bldg., Phila.	Annuity	2.00%	533 57	13 05	5 13	7 92
(b) Harry C. Dalton, 1700 Pine Street	Balance	14.26%	3,746 47	192 61	38 07	154 54
(c)						
(d)						
(e)						
(f)						
(g)						
(h)						
(i)						
(j) Totals		16.26%	4,280 04	205 66	43 20	162 46

18. NONTAXABLE OBLIGATIONS, LIBERTY BONDS, ETC.

(a) Obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia		
(b) Securities issued under the provisions of the Federal Farm Loan Act, or under such Act as amended		
(c) Liberty 3½% Bonds and other obligations of United States issued before Sept. 1, 1917, and obligations of United States possessions	5 000	175
(d) Liberty 4% and 4½% Bonds and other obligations of the United States issued after September 1, 1917	47 000	2129 25

A-1

SCHEDULE A—INCOME FROM TRADE OR BUSINESS (See Instruction 1)

3. Total receipts from trade or business (State kind of business)

Cost or Gross Sales		Gross Income Deductions	
1. Labor		10. Salaries, exclusive of "Labor," reported on Line 9	
2. Material and supplies		11. Interest on business indebtedness to others	
4. Merchandise bought for sale		12. Taxes on business and business property	
5. Other costs (Describe below or on separate sheet)		13. Losses by fire, storm, etc. (explain in terms provided thereafter at foot of page)	
6. Plus inventory at beginning of year		14. Bad debts arising from sales	
7. Totals (Lines 2 to 6, inclusive)		15. Depreciation, obsolescence, and depletion (explain in terms provided thereafter at foot of page)	
8. Less inventory at end of year		16. Rent, repairs, and other expenses (Describe below or on separate sheet)	
9. Net Cost or Gross Sales (Line 7 minus Line 8)		17. Totals (Lines 10 to 16, inclusive)	
		18. Total Deductions (Line 9 plus Line 17)	
		19. Net Profit (Line 3 minus Line 18) (Show as Item 7)	

Description of deductions claimed on Lines 5 and 16:

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 2)

1. Kind or Property	2. Amount Received	3. Cost	4. Value as of March 1, 1913	5. Depreciation (Other than Amount Claimed in Item 7)	6. Expenses	7. Gross Income (Column Deducted)	8. Net Profit (Enter on Item 8)

Explanation of deductions claimed in Column 7

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 3)

1. Kind or Property	2. Date Acquired	3. Amount Received	4. Deductions Allowable (Same Amount Claimed)	5. Cost	6. Value as of March 1, 1913	7. Depreciation (Since Acquired)	8. Net Profit (Enter on Item 9)

Sale of property owned

SCHEDULE D—CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS (See Instruction 4a)

1. Kind of Property	2. Date Acquired (Mo. Day Year)	3. Date Sold (Mo. Day Year)	4. Amount Received	5. Deductions Allowable (Same Amount Claimed)	6. Cost	7. Value as of March 1, 1913	8. Depreciation (Since Acquired)	9. Net Gain or Loss (Enter on Line 10)

Sale of property owned

SCHEDULE E—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 10, 15, AND 16

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

1. Kind of Property (If claimed under Schedule A)	2. Date Acquired	3. Cost or Other Basis	4. Depreciation Allowed (Since Acquired)	5. Cost	6. Value as of March 1, 1913	Amount of Depreciation Claimed This Year: 7. Previous years	8. This year

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A AND IN ITEM 13

1. Kind of Property	2. Date Acquired	3. Cost	4. Value as of March 1, 1913	5. Depreciation (Since Acquired)	6. Insurance and Amount Received	7. Net Loss Sustained	8. Deductible Loss

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements (if any), has been examined by me, and, to the best of my knowledge and belief, is a true and complete return made in good faith for the corresponding period in stated, pursuant to the Revenue Act of 1916 and the Regulations issued under authority thereof.

Sworn to and subscribed before me this ____ day of _____, 1917.

FIDELITY-PHILADELPHIA TRUST CO. Executor under Will of William J. Dobbin, Deceased

(Official character)

(This signature cannot be officially attested "Attorney" cannot sign)

A-2

Form 1041
U. S. Treasury Department
Internal Revenue Service

FIELD AUDIT
FIDUCIARY RETURN OF INCOME
For Calendar Year 1927

For Fiscal Year beginning _____, 1927, and ended _____, 1927

File This Return Not Later Than the 15th Day of the Third Month Following the Close of the Taxable Year

B 109
51519

Name of Estate or Trust: THIRD SECOND 7/11 OF 7/11/27 I. DUBOIS, DECEASED

Name and Address of Fiduciary: FIDELITY-PHILADELPHIA TRUST COMPANY
618 SECOND STREET,
PHILADELPHIA, PA.

11-15-27 Mem B 25 A-R-B

1. Was a return of income for 1927 filed on behalf of the estate or trust named above? Yes
2. If so, to what collector's office was it sent (give district or city and State)? 1st Penna. Dist Phila
3. Give date of creation of trust or decedent's death 1/11/27

CARDED 11-20-28

INCOME

1. Net profit from Trade or Business (Form 1040, Sch. A)		
2. Interest on Bank Deposits, Notes, and Corporation Bonds, etc. (except interest upon which a tax was paid at source)	5526	46
(a) Interest on Thirty Covenant Bonds upon which a tax was paid at source	19355	
3. Income from Partnerships, Fiduciaries, etc. (Give name and address)		
4. Rents and Royalties (Form 1040, Sch. B)		
5. Profit from Sale of Real Estate, Stocks, Bonds, etc. (Form 1040, Sch. D)		
6. Dividends on Stock of Domestic Corporations	5014	
7. Other Income (including dividends received on stock of foreign corporations) (Form 1040, Sch. C)		
(a)		
(b)		
(c)		
8. Total Receipts on Items 1 to 7	29965	46

DEDUCTIONS

9. Interest Paid	21	10
10. Taxes Paid PPH Inc. Tax " RE. 6095	1146	12
11. Losses by Fire, Storm, etc. (Explain in letter or rider)		
12. Bad Debts (Explain in letter or rider)		
13. Depletion (Explain in letter or rider)		
14. Other Deductions Authorized by Law (Explain in letter or rider)	1003	64
15. Total Deductions on Items 9 to 14	2180	22
16. Net Income (Item 8 minus Item 15)	27784	24

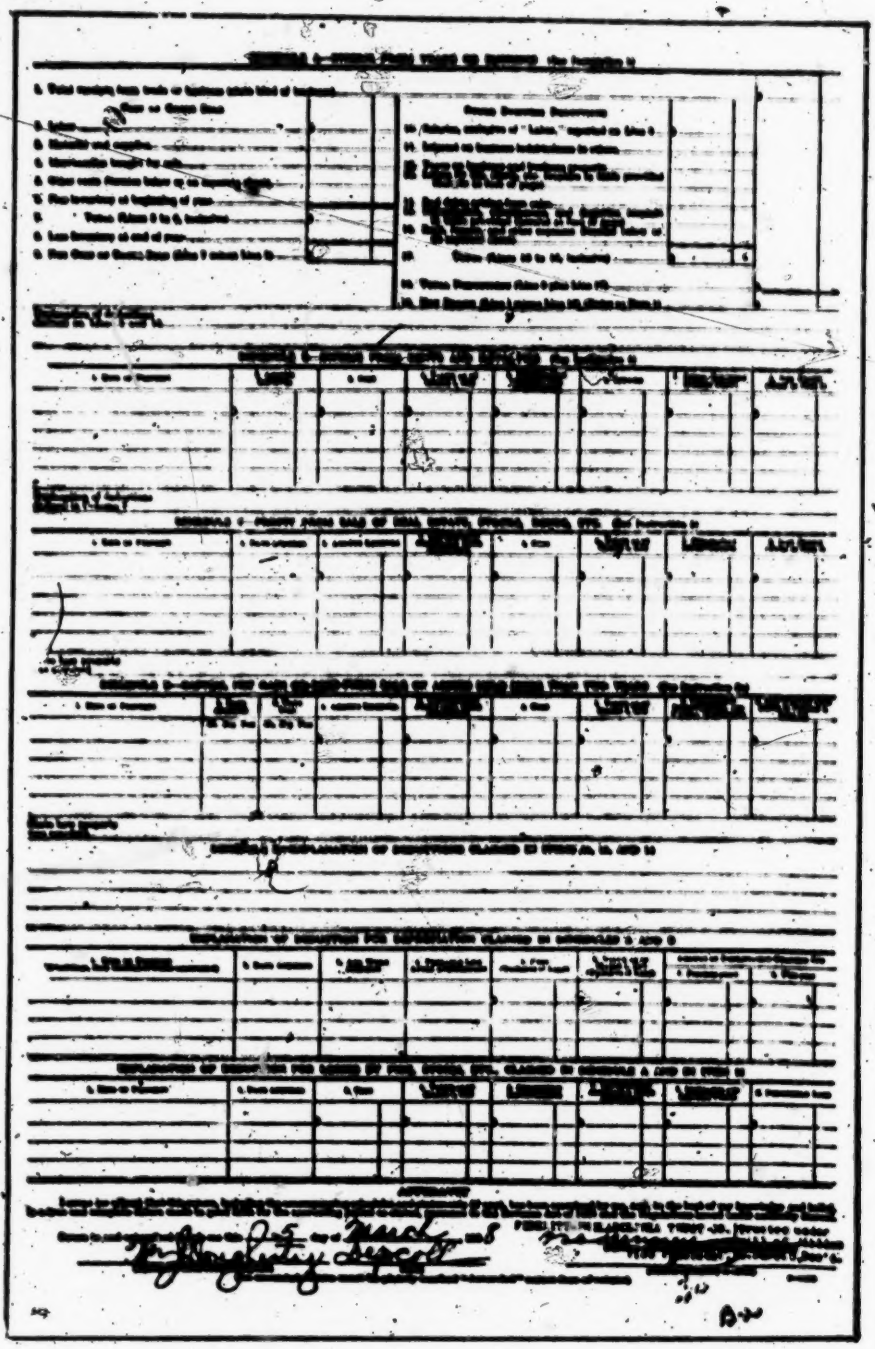
17. BENEFICIARIES' SHARES OF INCOME AND CREDITS (See Instruction 19)

Name and Address of Each Beneficiary	Is This Beneficiary a Resident or Non-Resident?	Amount of Income of Each Beneficiary (Item 16)	Proportion of Net Income Allowed Each Beneficiary	Computed Net Share of Each Beneficiary	Amount of Tax Due from Each Beneficiary	Amount of Tax Paid at Source on Each Beneficiary's Share
(a) Mary J. DuBois		$7/8 of Annuity of $4000.				
(b) c/o E. J. Levino & Co.		619	22	229	47	36
(c) 610 Fidelity Bldg., Philadelphia.						
(d) Exr. of Will of Mary J. DuBois	Balance of Income Collected by Exr.	4614	78	20 21	43	42
(e) Fidelity-Philadelphia Trust Co., Exrs.						
(f) 618 Second St., Philadelphia.					7	
(g)						
(h) Fidelity-Philadelphia Trust Co., Exr. of the Will of Mary C. DuBois, Dec'd 1/11/27	Balance of Income	3300	57	1275	17	72
(i)						
(j)						
(k)						
(l) Totals		8501		3237	107	10

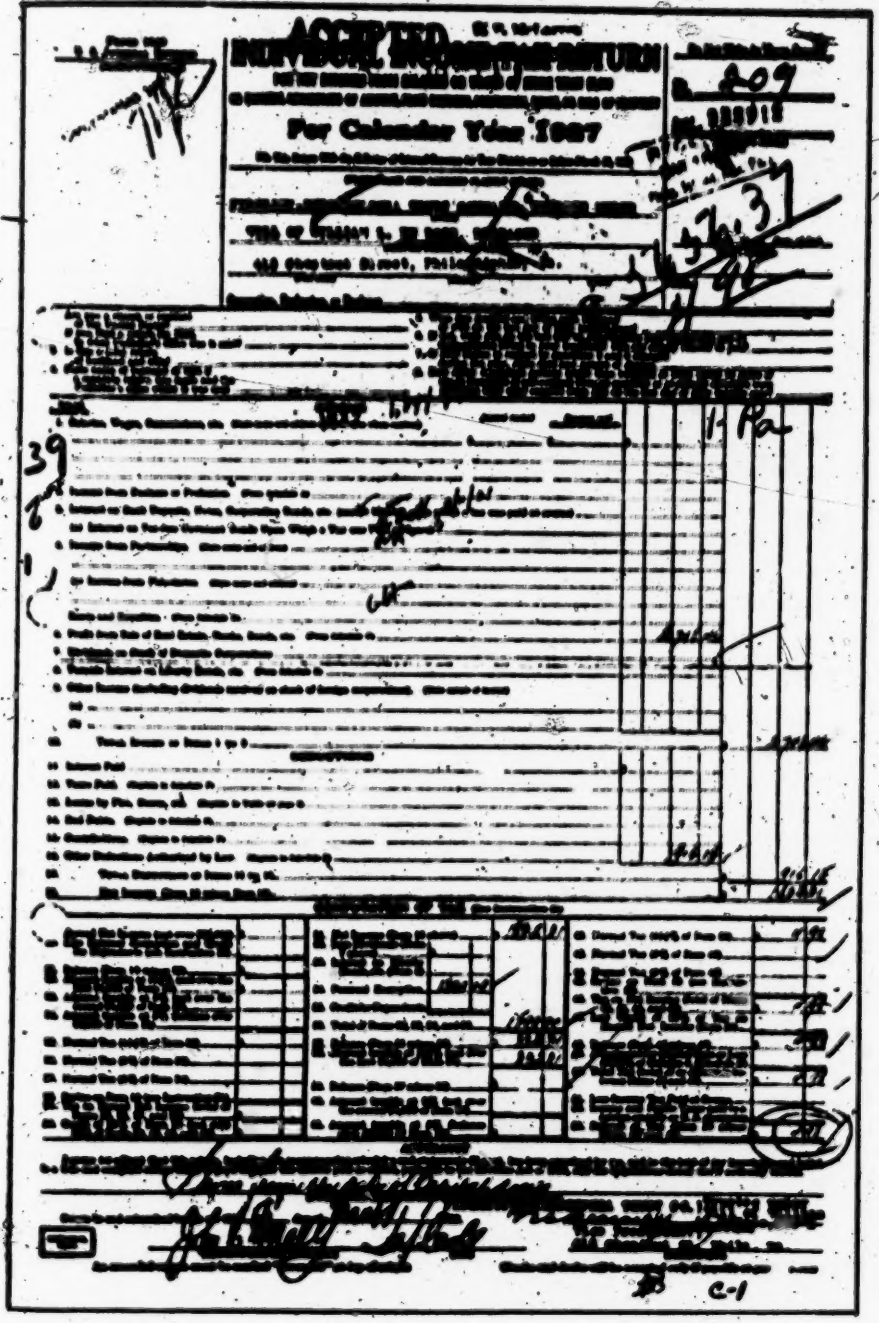
18. NONTAXABLE OBLIGATIONS, LIBERTY BONDS, ETC.

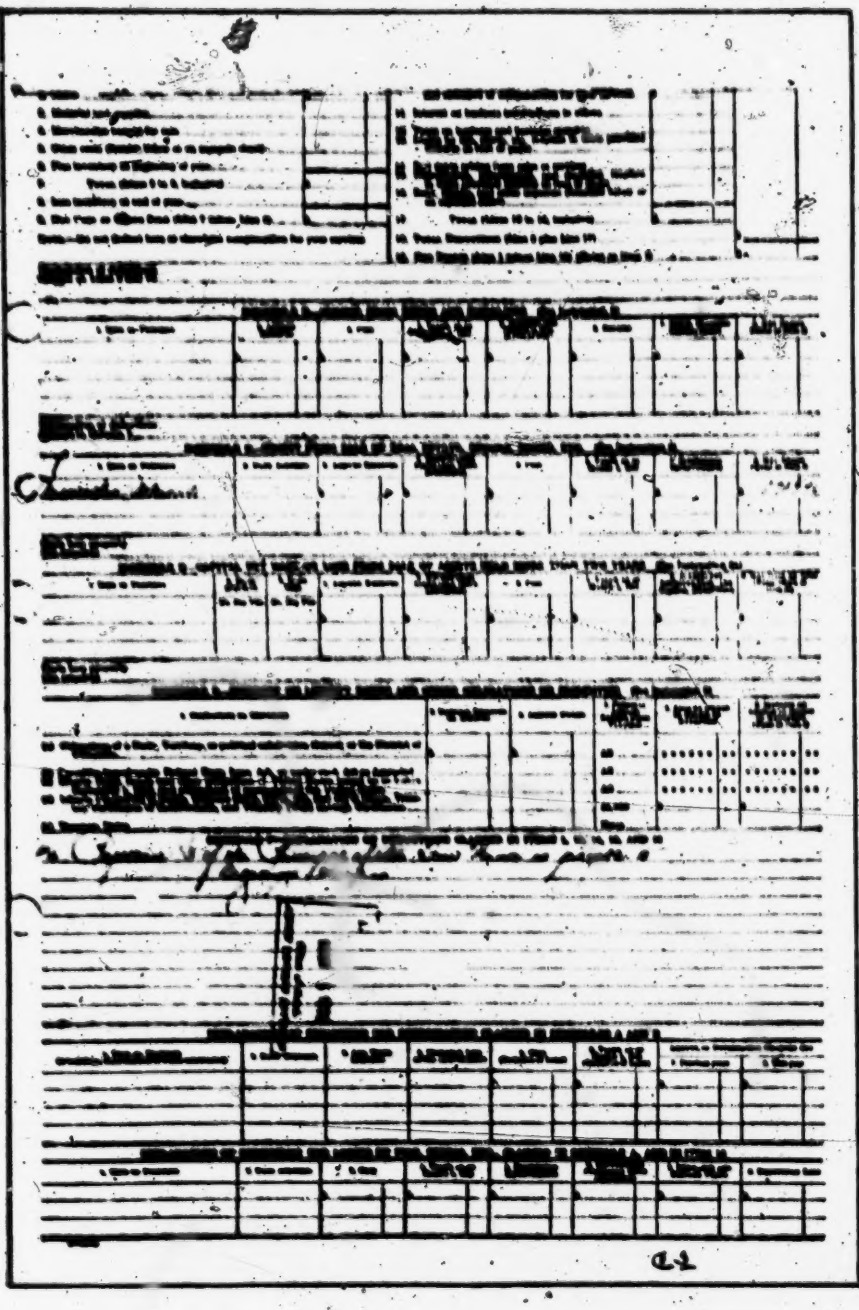
(a) Obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia	1	36 71
(b) Securities issued under the provisions of the Federal Farm Loan Act, or under such Act as amended		
(c) 3 Liberty 3½% Bonds and other obligations of United States issued before Sept. 1, 1917, and obligations of United States possessions	1	16
(d) 3 Liberty 4% and 4½% Bonds and other obligations of the United States issued after September 1, 1917	5	1037 61

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RESPONDENT'S EXHIBIT "C." 81



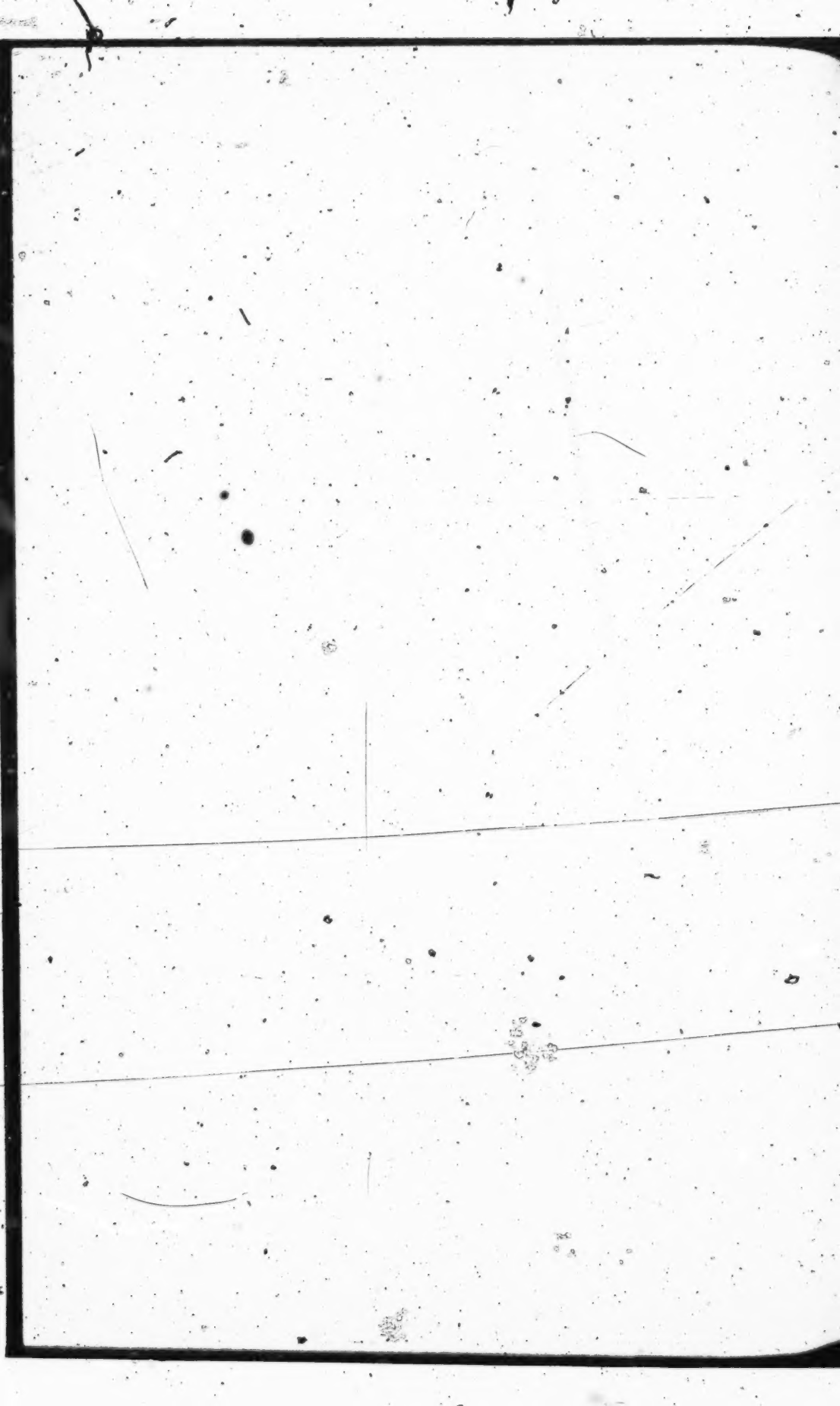


SALES FOR 1927

No. 2717 Account William L. Du Pont, dec'd. Capacity Trustee under Will

Description							
$2,000. Georgia ... Pwr.Co. 25 yr.1st. Con.6s due 3-1-46	12-26-27	$ 2,154.00	7-28-31	2,113.60			$2115.00
$10,000. Chic. Ill.& St. Paul Ry. Co.Gen.M. Con.6½'s due 5-1-00	3-19-29	9,464.00	10-26-29	8,300.00			8300.00
$5,000. Georgia Pwr.& Pwr.Co.1st. Con.6's due 4-1-47	3-31-27	5,375.00	5-7-31	4,757.50			4757.50
$6,100.U.S.2nd L.I.Con.4½'s	9-18-27	6,117.16	(11-15-30 5-24-32	6,075.20			6075.20
$5,000.U.S.2nd L.I.Con.4½'s	9-26-27	5,025.00	10-26-29	4,943.50			4943.50
$10,000.Penn Central Light & Pwr.Co. 1st & Ref.Mtge. Con. 6's due 12-1-43	12-1-27	10,300.00	(5-24-32 11-4-31	9,807.50			9807.50
		$ 38,747.16					$38988.70
				Net Profit		$ 22,748.46	

C-3



for and to control under their discretion the expenditure or accumulation for her benefit insofar as it may be necessary. . . .

"VII. In case of the decease of my said son and granddaughter without issue before my own decease, I give and bequeath the whole estate after the death of my wife, to the same charities and in the same proportions as enumerated in the residuary section VI, or in case of the decease of either of them, then the share appointed for the one so dying shall be paid or transferred to the said charities."

By writing, signed, acknowledged, delivered to the executors of the decedent, and duly filed and recorded as required by the statutes of Pennsylvania, Mary C. DuBois, the widow, elected to take under the will in lieu of the interest allowed her in decedent's estate by the law of Pennsylvania.

During 1926 and 1927, the years involved in this proceeding, the trustee made payments to the widow as provided for under the will which amounts added to payments of prior years, did not aggregate a sum equal to that which would have been apportionable to her as of the date of decedent's death under the Pennsylvania statutory provisions had she not elected to take under the will.

Mary C. DuBois, granddaughter of the decedent, died on August 26, 1924, while a minor, having no issue as of the date of her death, and never having had issue. Mary C. DuBois, the widow, died on November 22, 1927.

Petitioner for the year 1926 filed a form 1041 return only, and for the year 1927 petitioner filed a form 1041 return and a form 1040 return.

(Excerpts from transcript of record, January 28, 1932.)

Mr. PERRY. Your Honor, we submit a stipulation of facts that is agreeable to both parties.

The MEMBER. The stipulation may be filed as a part of the record.

[Blank.]

[Blank.]

Before United States Board of Tax Appeals

25 B.T.A.

FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE UNDER THE WILL of William L. DuBois, Deceased, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

DOCKET NOS. 48492, 51669. PROMULGATED APRIL 30, 1932

1. Where the widow elected to take under decedent's will in lieu of dower, held that income of the trust estate paid over to the widow

during the taxable years in accordance with the terms of the will is not deductible as a distribution of income to a beneficiary, within the provisions of section 219 (b) (2) of the Revenue Act of 1926. Julia Butterworth, et al., Trustees, 22 B. T. A. 899 followed.

2. Where one third of the corpus of the trust estate was, by the terms of decedent's will, given to charitable institutions after the widow's death but during her lifetime the income was payable to her, held, that the respondent did not err in failing to allow as a deduction on that account any portion of the income so paid to the widow during the taxable years.

Findings of fact and opinion

30 Robert T. McCracken, Esq., and John B. Peery, C. P. A., for the petitioner; Maxwell M. Mahony, Esq., for the respondent.

These proceedings, duly consolidated for hearing, are for the redetermination of deficiencies in income tax as follows:

Docket no.	Year	Deficiency
48492	1926	$900.79
51069	1927	1,044.97

In docket no. 48492, petitioner alleged in paragraph 4 (b) of its petition that, in determining the deficiency for the year 1926 respondent erred in computing a normal tax upon the sum of $3,740.42 representing dividends on stock of domestic corporations. At the hearing, respondent also confessed error on this point as alleged.

In docket nos. 48492 and 51069, covering the years 1926 and 1927, two substantially identical issues are raised by the pleadings and submitted for decision here, namely, (a) whether or not respondent erred in determining that income received during the taxable years and distributed to the widow under the terms of the decedent's will constitute capital expenditures, taxable to the trustee; and (b) in the event such income is held to be taxable to the trustee, whether or not the respondent erred in failing to allow as a deduction from gross income the amount thereof alleged to have been accumulated for the benefit of certain charitable institutions named in the decedent's will.

FINDINGS OF FACT

The petitioner, a Pennsylvania corporation, with its principal office at Philadelphia, is successor to the Philadelphia Trust Company, and the duly appointed qualified and acting trustee under the will of William L. DuBois, deceased. Decedent died testate
37 on October 26, 1918, while a resident of Pennsylvania. Decedent's will, dated December 14, 1915, with codicils thereto, provided, so far as pertinent here, as follows:

"VI. All the rest, residue, and remainder of my estate, real, personal, and mixed. . . . I give, devise and bequeath to my son, Henry

C. DuBois, and the Philadelphia Trust Company, in trust for the following uses, intents, and purposes, that is to say, to hold and invest the said trust estate either in the securities and other assets that I may leave or in such others as my trustees in their discretion may acquire, with the power to acquire real estate, and to alter, sell, change, and shift the investments, . . . releasing them from all liability to loss by reason of the exercise of this discretion; to collect the income and to pay first the sum of four thousand (4,000) dollars per annum to my son Henry C. DuBois, . . . until the death of his mother, and the balance to my wife, Mary C. DuBois, for and during all the term of her natural life, and upon her decease, . . . to continue the said trust estate for the following purposes, viz: . . . to pay two thirds of the income to my son Henry C. DuBois . . . for and during all the term of his natural life, and upon his decease to transfer, convey, and assign the portion of the trust estate thus directed to be held for him to such person or persons . . . or charities, and for such estate or estates as he, . . . shall by his last will and testament direct, limit, and appoint, . . . and in default of his exercise of his power of appointment, to transfer, convey, and assign the said portion to the children and issue of deceased children of my son Henry by representation . . . and in default of appointment and issue, then to the following charities in the proportions herein named: . . .

Pennsylvania Hospital	50%
The Presbyterian Orphanage	10%
The Presbyterian Hospital	15%
The Board of Foreign Missions for the Presbyterian Church	15%

38 As to the remaining one third of the income, I direct that it be accumulated during the minority of my granddaughter, Mary C. DuBois, the said accumulations not to be for her benefit except as to the allowance hereinafter provided, but to be paid from the time of my decease up to the time of her majority, or death if it occur earlier, with all accretions and increase, to the Pennsylvania Hospital as a gift to it; and from and after her majority, the said income shall be paid to her for and during the term of her natural life . . . and from and immediately after her decease then to transfer the principal upon which she had thus been appointed to receive the income, and which was held for her benefit, being the one-third part remaining of my residuary estate, to the children and remoter issue of my said granddaughter by representation, and in default of issues, then to the same charities and in the same proportions as already named in connection with my said son Henry's share; provided that a sum not exceeding three thousand (3,000) dollars per annum out of the income may be expended or accumulated for her benefit during her minority, should that amount be required for the purpose, and I appoint Henry C. DuBois and the Philadelphia Trust Company to be her guardians to arrange for and to control under their discretion the expenditure or accumulation for her benefit inso-far as it may be necessary. . . .

"VII. In case of the decease of my said son and granddaughter without issue before my own decease, I give and bequeath the whole estate after the death of my wife, to the same charities and in the same proportions as enumerated in the residuary section VI, or in case of the decease of either of them, then the share appointed for the one so dying shall be paid or transferred to the said charities."

By writing, signed, acknowledged, delivered to the executors of the decedent, and duly filed and recorded as required by the statutes of Pennsylvania, Mary C. DuBois, the widow, elected to take
39 under the will in lieu of the interest allowed her in decedent's estate by the law of Pennsylvania.

During 1926 and 1927, the years involved in this proceeding, the trustee made payments to the widow as provided for under the will, which amounts, added to payments of prior years, did not aggregate a sum equal to that which would have been apportionable to her as of
41 the date of deceased's death under the Pennsylvania statutory provisions had she not elected to take under the will.

Mary C. DuBois, a granddaughter of the deceased, died on August 26, 1924, while a minor, having no issue as of the date of her death, and never having had issue. Mary C. DuBois, the widow died on November 22, 1927.

Petitioner for the year 1926 filed a form 1041 only, and for the year 1927 petitioner filed a form 1041 return and a form 1040 return.

For the year 1926, no form 1040 return was filed by the petitioner, and no tax was paid. The form 1041 return filed by the petitioner for the year 1926 disclosed the following:

Income:		
Interest	$25,021.68	
Dividends	4,346.00	
		$29,367.68
Deductions:		
Taxes and other deductions		2,678.01
Net income		$26,689.67
Distributed:		

	Dividends	Other income	Total
Henry DuBois (son)	$368.38	$3,043.33	$3,402.11
Mary C. DuBois (widow)	3,748.42	19,281.14	23,027.56
	$4,346.00	$22,343.67	$26,689.67

40 For the year 1927 a form 1040 return was filed by the petitioner, which reflected the following computation of tax:

Income: Profit sale of stocks	$2,748.46
Deduct: "Proportion ⅓ of the principal of this trust fund is payable to organized charities"	916.15
Net income	$1,832.31
Tax payable (and paid thereon)	4.96

The petitioner also filed a form 1041 return for the year 1927, which disclosed the following:

Income:		
Interest	$24,951.46	
Dividends	5,014.00	
		$29,965.46
Deductions:		
Interest, taxes and other deductions		2,180.97
Net income		$27,784.59

Distributed:

	Dividends	Other income	Total
Henry C. DuBois	$819.00	$2,797.40	$3,616.40
Est. of will of Mary C. DuBois (ben. income collected to 11-22-27)	4,014.00	18,077.43	22,091.43
P. P. Co. est. will of Mary C. DuBois, dec'd (income accrued to 11-27-27)	180.57	1,000.00	2,276.25
	$5,014.00	$22,770.59	$27,784.59

OPINION

TRAMMELL: During the taxable years the petitioner trustee paid over to the decedent's widow income from the corpus of the trust estate in accordance with directions contained in the will. The widow elected to take under the will in lieu of her statutory dower interest. The amount so paid to the widow in the taxable years, together with the amounts paid to her in prior years, did not equal the value of her dower interest at the date of decedent's death, thereafter surrendered by her. Respondent in computing the deficiencies, disallowed as deductions from the petitioner's gross income the amounts so paid to the widow during the taxable years. The corrections of this action of the respondent is the basis of the first issue presented for consideration here.

The amounts of said income of the trust estate so paid to the widow are claimed by the petitioner as deductions under section 219 (b) (2) of the Revenue Act of 1926, the provisions of which are the same as those of section 219 (b) (2) of the Revenue Act of 1924. The decedent died a resident of Pennsylvania.

In Julia Butterworth et al., Trustees, 23 B.T.A. 839, the decedent died testate in 1925, while a resident of Pennsylvania, and the widow in that case elected to take under the will in lieu of dower. In the taxable years 1924 and 1925 the trustees under the decedent's will paid over to the widow the sums to which she was entitled under the will and claimed deductions therefor in computing the net income of the testamentary trust. The amounts so paid to the widow, plus the amounts similarly paid to her in previous years, were not
41 equal to the value of the lower interest that she relinquished by electing to take under the will. We held that the amounts so paid to the widow were paid to her in satisfaction of her dower right and were not distributions of income within the meaning of

section 219 (b) (2) of the Revenue Act of 1924, and hence not deductible in computing net income of the trust. To the same effect see also Frank Parlee et al., Trustees, 23 B.T.A. 846.

The question presented in the case at bar is the same as that considered and decided by us adversely to the petitioner's contention in the cases above referred to, and both the law and the facts in all essential respects are identical. Accordingly, on authority of those decisions, the respondent's action on the first issue here is approved.

The second issue raised by the petitioner involves the question whether the respondent erred in denying as deductions amounts equal to one third of the income of the trust paid to the widow in the taxable years, one third of the corpus being payable, after the death of the widow, to certain charitable institutions. This issue also, we think, must be decided against the petitioner.

In paragraph VI of his will, decedent devised and bequeathed the residue of his estate to the trustee, for the purpose, among other things, to collect the income and pay first the sum of $4,000 per annum, to decedent's son, Henry, until the death of his mother, and the balance of the income to the decedent's wife (widow) "for and during all the term of her natural life." Upon the death of the widow two thirds of the income was to be paid to the son for and during the term of his natural life. The remaining one third of the income, after the death of the widow, was to be accumulated during the minority of the decedent's granddaughter, and this accumulated income upon the happening of certain contingencies, was to be given to the Pennsylvania Hospital. The principal, consist-
43 ing of one third of the decedent's residuary estate, or corpus of the trust, after the decease of the granddaughter, was to be transferred to the granddaughter's children, if any, but in default of such issue, was to go to certain designated charities.

By these provisions of the will, the entire income from the decedent's residuary estate, which constituted the corpus of the trust, less $4,000 per annum given to the son, was payable to the widow for and during the term of her natural life. It follows that during the widow's lifetime, the charitable institutions were not entitled to receive any portion of the income. Upon the death of the granddaughter in 1924 without issue, the contingent interest of the charities in the one-third part of the residuary estate became vested, but such institutions still were not entitled to receive any income therefrom until after the death of the widow. The amounts of income from the trust estate, paid over to the widow during the taxable years in accordance with the terms of the will do not, therefore, constitute income accumulated for the benefit of or in any event payable to the charitable institutions, and hence are not deductible from gross income in computing the net income of the trust estate. The respondent's action on this point is approved.

In docket no. 48492, judgment will be entered under rule 50.

In docket no. 51669, judgment will be entered for the respondent.

44 Before United States Board of Tax Appeals, Washington

Docket No. 48492

FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE U/W WILLIAM L. DuBois, Deceased, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Entered June 3, 1932

Pursuant to findings of fact and opinion promulgated April 30, 1932, the respondent and the petitioner herein, to wit, on March 26, 1932, having filed an agreed proposed redetermination under rule 50 for the year 1926, it is

Ordered and decided that there is a deficiency for the year 1926 in the amount of $718.44.

(Sgd.) CHARLES M. TRAMMELL, *Member.*

45 Before United States Board of Tax Appeals, Washington

Docket No. 51669

FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE U/W OF William L. Dubois, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Entered May 4, 1932

Pursuant to the determination of the Board, as set forth in its report promulgated April 30, 1932, it is

Ordered and decided: That there is a deficiency of $1,044.97 for the year 1927.

(Sgd.) CHARLES M. TRAMMELL, *Member.*

46 In United States Circuit Court of Appeals, for the Third Circuit

B.T.A. Docket Nos. 48492 and 51669

[Title omitted.]

Petition for Review of Decision of the United States Board of Tax Appeals

Filed June 13, 1932

To the Honorable the Judges of Said Court:

Your petitioner respectfully represents:

1. That it is a corporation duly organized under the laws of the State of Pennsylvania having its principal office at 135 South Broad Street, in the city of Philadelphia, Pennsylvania, in the third circuit, and files this petition for review by the United States Circuit Court of Appeals for the Third Circuit at Philadelphia.

2. This appeal involves an alleged deficiency in income tax for the taxable year 1927 in the sum of $1,044.97, and $718.44 for the year 1926.

3. William L. DuBois dies testate on October 26, 1918, a resident of Pennsylvania, and by his will he appointed Philadelphia Trust Company as trustee under his will. Your petitioner is the successor of the Philadelphia Trust Company and is now trustee of the estate of said decedent.

47 4. The will of said decedent provided, in part, as follows:

"VI. All the rest, residue, and remainder of my estate, real, personal, and mixed . . . I give, devise, and bequeath to my son, Henry C. DuBois, and the Philadelphia Trust Company, in trust for the following uses, intents, and purposes, that is to say, to hold and invest the said trust estate either in the securities and other assets that I may leave or in such others as my trustees in their discretion may acquire, with the power to acquire real estate, and to alter, sell, change, and shift the investments, . . . releasing them from all liability to loss by reason of the exercise of this discretion; to collect the income and to pay first the sum of four thousand (4,000) dollars per annum to my son Henry C. DuBois, . . . until the death of his mother, and the balance to my wife, Mary C. DuBois, for and during all the term of her natural life, and upon her decease, . . . to continue the said trust estate for the following purposes, viz: . . . to pay two thirds of the income to my son Henry C. DuBois . . . for and during the term of his natural life, and upon his decease to transfer, convey, and assign the portion of the trust estate thus directed to be held for him to such person or persons . . . or charities, and for such estate or estates as he, . . . shall by his last will and testament direct, limit, and appoint, . . . and in default of his exercise of his power of appointment, to transfer, convey, and assign the said portion to the children and issue of deceased children of my son Henry by representation . . . and in default of appointment and issue, then to the following charities in the proportions herein named:

Pennsylvania Hospital	55%
The Presbyterian Orphanage	15%
The Presbyterian Hospital	15%
The Board of Foreign Missions of the Presbyterian Church	15%

48 As to the remaining one third of the income, I direct that it be accumulated during the minority of my granddaughter, Mary C. DuBois, the said accumulations not to be for her benefit except as to the allowance hereinafter provided, but to be paid from the time of my decease up to the time of her majority, or death if it occur earlier, with all accretions and increase, to the Pennsylvania Hospital as a gift to it; and from and after her majority, the said income shall be paid to her for and during the term of her natural life . . . and from and immediately after her decease then to transfer the principal upon which she had thus been appointed to receive the income, and which was held for her benefit, being the one third part remaining of my residuary estate, to the children and remoter issue of my said granddaughter by representation, and in default of issues, then to the same charities and in the same proportions as already named in connection with my said son Henry's share; provided that a sum not exceeding three thousand (3,000) dollars per annum out of the income may be expended or accumulated for her benefit during her minority, should that amount be required for the purpose, and I appoint Henry C. DuBois and the Philadelphia Trust Company to be her guardians to arrange for and to control under their discretion the expenditure or accumulation for her benefit in so far as it may be necessary. . . .

"VII. In case of the decease of my said son and granddaughter without issue before my own decease, I give and bequeath the whole estate after the death of my wife, to the same charities and in the same proportions as enumerated in the residuary section VI, or in case of the decease of either of them, then the share appointed for the one so dying shall be paid or transferred to the said charities."

5. By writing signed, acknowledged, and delivered to the executors of the decedent and duly filed and recorded as required by the
49 statutes of Pennsylvania, Mary C. DuBois, the widow of the said decedent, elected to take under the will in lieu of the interest allowed her in decedent's estate by the law of Pennsylvania.

6. During the years 1926 and 1927 the trustee made payments to the widow as provided for under the will which amounts added to payments for prior years did not aggregate a sum equal to that which would have been apportionable to her as of the date of the decedent's death under the Pennsylvania statutory provisions had she not elected to take under the will.

7. Mary C. DuBois, a granddaughter of the deceased, died on August 26, 1924, while a minor having no issue as of the date of her death and never having had issue. Mary C. DuBois, the widow, died November 22, 1927.

8. For the year 1926 your petitioner filed no form 1040 return, but filed a form 1041 for the year 1926 which disclosed the following:

Income:		
Interest	$95,001.78	
Dividends	4,846.00	
		$99,847.78
Deductions:		
Taxes and other deductions		2,678.01
Net income		$96,969.77
Distributed:		

	Dividends	Other income	Total
Henry DuBois (son)	[illegible]	[illegible]	[illegible]
Mary C. DuBois (widow)	[illegible]	[illegible]	[illegible]
	$4,846.00	$92,843.87	$96,689.87

50 9. For the year 1927 your petitioner filed a form 1040 return which reflected the following computation of tax:

Income: Profit sale of stock	$2,738.40
Deduct: "Proportion ⅙ of the principal of this trust fund is payable to Organized Charities"	916.15
Net income	$1,822.31
Tax payable (and paid thereon)	4.08

and a 1041 return which discloses the following:

Income:		
Interest	$94,951.46	
Dividends	5,014.00	
		$99,965.46
Deductions:		
Interest taxes and other deductions		2,180.87
Net income		$97,784.59
Distributed:		

	Dividends	Other income	Total
Henry C. DuBois	$819.00	$3,797.40	$3,616.40
Exr. of will of Mary D. DuBois (bal. income collected to 11-22-27)	4,014.40	18,077.42	22,091.82
E. P. Co. exr. will of Mary C. DuBois, dcsd. Income accrued to 11/27/27	280.87	1,806.68	2,276.35
	$5,014.00	$23,770.59	$27,784.59

10. That the Commissioner of Internal Revenue mailed to your petitioner deficiency letters giving notice of an alleged deficiency in income tax for the year 1926 in the amount of $905.76 and
51 for the year 1927 in the amount of $1,044.97 with interest on the ground that your petitioner should include in taxable income payments made out of the income of this trust to the beneficiaries under the above quoted portions of the will of the decedent without any deductions by reason of such payments or by reason

of the charitable remainders set up in the above will. Within sixty days from the date of said respective deficiency letters your petitioner appealed from the aforesaid determination of the Commissioner of Internal Revenue to the United States Board of Tax Appeals.

11. By order of the Board of Tax Appeals said two cases involving the years 1926 and 1927 were consolidated and were heard together and a single decision rendered therein.

12. On April 30, 1932, the United States Board of Tax Appeals entered its decision denying the appeal of your petitioner as to the years 1926 and 1927, and on May 4, 1932, entered judgment in the amount of $1,044.07 with interest against your petitioner as a deficiency of income tax for the year 1927, and on June 3, 1932, entered further judgment in the amount of $718.44 with interest against your petitioner as a deficiency of income tax for the year 1926.

13. That your petitioner believes that under paragraph 219 (b) (2) of the Revenue Act of 1926 your petitioner should be allowed as a deduction in computing the net income of this estate for the years 1926 and 1927, respectively, the amount of the income of the trust which was currently distributed by your petitioner to the beneficiaries.

14. Your petitioner further believes that if its first contention is not sustained it must be concluded that the income from this trust to the extent of one third thereof is being accumulated for
52 charitable purposes and is, therefore, not subject to the payment of income tax.

Wherefore your petitioner appeals to this honorable court and prays this honorable court to review the decision of the United States Board of Tax Appeals entered on April 30, 1932, and the judgments entered thereon on May 4, 1932, and June 3, 1932, and prays that the judgment of the United States Board of Tax Appeals be set aside and reversed, and files herewith the assignments of error attached hereto which are incorporated as a part of this petition.

And your petitioner will ever pray, etc.

FIDELITY-PHILADELPHIA TRUST COMPANY,
Trustee of the Estate of William L. DuBois, Deceased,
By T. E. FRAME, *Vice President.*

[*Duly sworn to by T. E. Frame; jurat omitted in printing.*]

53 *Assignments of error*

And now, to wit, June 8, 1932, comes Fidelity-Philadelphia Trust Company, trustee of the estate of William L. DuBois, deceased, petitioner and appellant in the foregoing petition, by its attorney, Robert T. McCracken, and makes the following assignments of error:

1. The United States Board of Tax Appeals erred in holding in its opinion as follows:

"The question presented in the case at bar is the same as that considered and decided by us adversely to the petitioner's contention in the cases above referred to, and both the law and the facts in all essential repects are identical."

2. The United States Board of Tax Appeals erred in holding in its opinion as follows:

"Accordingly, on authority of those decisions, the respondent's action on the first issue here is approved."

3. The United States Board of Tax Appeals erred in holding in its opinion as follows:

"This issue also, we think, must be decided against the petitioner."

4. The United States Board of Tax Appeals erred in holding in its opinion as follows:

"By these provisions of the will, the entire income from the decedent's residuary estate, which constituted the corpus of the trust, less $4,000 per annum given to the son, was payable to the widow for and during the term of her natural life. It follows that during the widow's lifetime, the charitable institutions were not entitled to receive any portion of the income."

5. The United States Board of Tax Appeals erred in holding in its opinion as follows:

54 "Upon the death of the granddaughter in 1924, without issue, the contingent interest of the charities in the one third part of the residuary estate became vested, but such institutions still were not entitled to receive any income therefrom until after the death of the widow."

6. The United States Board of Tax Appeals erred in holding in its opinion as follows:

"The amounts of income from the trust estate, paid over to the widow during the taxable years in accordance with the terms of the will do not, therefore, constitute income accumulated for the benefit of or in any event payable to the charitable institutions, and hence are not deductible from gross income in computing the net income of the trust estate. The respondent's action on this point is approved."

7. The United States Board of Tax Appeals erred in entering final judgment for the Commissioner of Internal Revenue as follows:

"Pursuant to the determination of the Board, as set forth in its report promulgated April 30, 1932, it is ordered and decided: That there is deficiency of $1,044.97 for the year 1927."

8. The United States Board of Tax Appeals erred in entering final judgment for the Commissioner of Internal Revenue as follows:

"Pursuant to findings of fact and opinion promulgated April 30, 1932, the respondent and the petitioner herein, to wit, on March 26, 1932, having filed an agreed proposed redetermination under Rule 50 for the year 1926, it is ordered and decided that there is a deficiency for the year 1926 in the amount of $718.44."

9. The United States Board of Tax Appeals erred in failing
55 to hold, in accordance with the contention of your petitioner, that your petitioner should be allowed a deduction in computing taxable income of this estate of the amount of income paid to beneficiaries in accordance with the terms of the trust.

10. That the United States Board of Tax Appeals having disregarded the foregoing contention of your petitioner erred in failing to hold that one third of the income of this trust was accumulated for charitable purposes and should, therefore, be deducted in determining the net taxable income of the estate.

ROBERT T. MCCRACKEN,
Attorney for Appellant.

Before U.S. Board of Tax Appeals

Pracipe for record on appeal

Filed June 13, 1932

To the Clerk of the United States Board of Tax Appeals:

Kindly certify, as part of the record on appeal in the above case, the following:

1. Docket entries.
2. Petitions to the Board of Tax Appeals for redetermination of the rulings of the Commissioner with amendments.
3. Answers of the Commissioner.
4. Motion to consolidate cases, docket nos. 48492 and 51669, and order granting same January 25, 1932.
5. Stipulation of facts submitted by the parties with the exhibit thereto.

56 6. Decision, finding, and opinion of the Board dated April 30, 1932.

7. Final decisions of the Board entered May 4, 1932, as to the year 1927, and June 8, 1932, as to the year 1926.
8. Petition to the United States Circuit Court of Appeals for the Third Circuit to review the decision of the Board.
9. Assignments of error.
10. This praecipe.

ROBERT T. MCCRACKEN,
Attorney for Petitioner.

[Clerk's certificate to foregoing transcript omitted in printing.]

57 [Minute entry of argument and submission, Oct. 6, 1932, omitted in printing.]

58 In United States Circuit Court of Appeals for the Third Circuit

October term, 1932

No. 4964

FIDELITY PHILADELPHIA TRUST COMPANY, TRUSTEE UNDER THE WILL of William L. DuBois, Deceased, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for review from the United States Board of Tax Appeals

Opinion

Filed March 4, 1933

Before WOOLLEY, DAVIS and THOMPSON, Circuit Judges

WOOLLEY, Circuit Judge: William L. DuBois, a resident of Pennsylvania, died in 1918. By his will he bequeathed the bulk of his estate in trust to predecessors of the petitioner, now the sole trustee, and provided that they should collect the income and pay annually the sum of $4,000 to his son until the death of his mother, and
59 pay the balance to his (the testator's) wife for life, and on her death to pay two thirds of the income to his said son for life, and thereafter distribute two thirds of the principal of the estate as the son should appoint, or, failing appointment and issue, to named charities; and as to the remaining one third of the estate, to pay the income to his granddaughter for life, with remainders over to her issue or, issue failing, to named charities.

The testator's wife elected to take under the will in lieu of the interest in her husband's estate which the law of Pennsylvania gave her.

During 1926 and 1927, the tax years in question, the trustee made payments of income to the widow in amounts which, together with payments made in other years, were not equal to the value of her statutory interest in her husband's estate, had she elected to take against the will. In 1924, the testator's granddaugher died while a minor and without issue. His wife died in 1927.

In computing taxable net income in its return for the stated tax years, the trustee deducted the income it had distributed to the widow under what it conceived to be authority conferred by section 219 of the Revenue Act of 1926 (44 Stat). The Commissioner of

Internal Revenue, being influenced by the decisions in Warner v. Walsh, 15 Fed. (2d) 807; United States v. Bolster, 26 Fed. (2d) 760 and Allen v. Brandeis, 29 Fed. (2d) 868, disallowed the deductions and assessed deficiency taxes against the trustee. On appeal the United States Board of Tax Appeals sustained the Commissioner on authority of its decision in Julia Butterworth, et al., Trustees, 28 B.T.A. 889. The case is in this court on the trustee's petition to review the action of the Board.

Two questions were decided by the Board and the same questions are submitted here. The first—the right of a trustee, under (a) the statute, in computing taxable income, to deduct income distributed, after her election, to a widow as beneficiary—is the question which was submitted and decided in different ways by the Board and by this court in Butterworth v. Commissioner, Fed. (2d) . The other arises out of provisions in the DuBois will for limitations over to charities, and in substance is, whether the Commissioner erred in disallowing the trustee's deductions in amounts at least equal to one third of the income of the trust paid to the widow, in view of the provision that one third of the corpus of the estate should, after the death of both his wife and granddaughter, be paid to named charities. The Board sustained the Commissioner's disallowance of deductions on both points, the practical effect of which was to place in some measure a tax burden upon the widow, who was exempt under the cited decisions, and upon remaindermen, in this case charities, which otherwise are exempt under the law.

Our decision on the first question will make consideration of the second unnecessary. We hold that the decision in Butterworth, et al. v. Commissioner, Fed. (2d) , rules the instant case and, accordingly, calls for a reversal of the judgments of the Board of Tax Appeals in the two appeals there consolidated and heard together.

Thomrson, Circuit Judge, dissenting.

A true copy.

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

61 In United States Circuit Court of Appeals for the Third Circuit

October term, 1932

No. 4964

FIDELITY-PHILADELPHIA TRUST CO., TRUSTEE UNDER WILL OF WILLIAM L. DUBOIS, deceased, petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Judgment filed March 4, 1933

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the order or decree of the said Board of Tax Appeals in this cause be, and the same are hereby reversed.

Philadelphia, March 4, 1933.

WILLIAM H. WOOLLEY, *Circuit Judge.*

[File endorsement omitted.]

62 [Clerk's certificate to foregoing transcript omitted in printing.]

63 Supreme Court of the United States

Order Allowing Certiorari.

Filed May 29, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File no. 37674. U.S. Circuit Court of Appeals, Third Circuit. Term no. 76. David Burnet, Commissioner of Internal Revenue, petitioner, vs. Fidelity-Philadelphia Trust Company, Trustee under the Will of William L. DuBois, Deceased. Petition for a writ of certiorari and exhibit thereto. Filed May 17, 1933. No. 76, O.T. 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933